

**CRIMINAL LAW POLICY COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call January 8, 2016**

The Criminal Law Policy Committee of the Indiana Judicial Conference convened by conference call on January 8, 2016, at 3:00 p.m. Eastern Standard Time.

1. **Members participating.** Mark Spitzer, Chair, Kent Apsley, Blaine Akers, Denny Bridges, Tom Clem, Greg Coy, Kim Hall, Ryan King, and Nathan Verkamp participated in the call.
2. **Staff participating.** Mike McMahon and Jason Bennett provided the Committee with staff assistance.
3. **Minutes of January 30, 2015 conference call.** Members approved the proposed minute of the Committee's January 30, 2015 conference call.
4. **Asset forfeiture procedures.** Members discussed the potential impact on Indiana forfeiture activity of the cancellation of funding for the federal "Equitable Sharing" forfeiture program. Judge Apsley, who had substantial experience with the federal program as a prosecutor, said he expected that Indiana transfers of assets to the federal program are likely to stop due to the funding cancellation. Based on that expectation, Judge Apsley thought the draft amendments to Indiana statutes on transfer of assets to federal authorities, amendments the Committee considered in fall 2014, would not be needed. Judge Clem felt the amendments should still be pursued, given the potential problems demonstrated by the Clark County forfeiture decision in *State v. Downey*, 14 N.E.3d 812 (Ind. Ct. App. 2014), *transfer denied*. He noted the likelihood of the federal program's revival, given its popularity. The Committee then noted the 2016 Senate Bill 123, Senator Randolph's bill on Indiana's state asset forfeiture procedures. The Committee questioned whether the bill would preclude transfer of seized materials to federal authorities, given its prevention of state forfeiture until there was a conviction or guilty plea. After discussion it was agreed to monitor the impact of the federal program's cancellation, have Mike McMahon send out the amendments the Committee considered in 2014 and 2015 as well as the *Downey* case, and revisit the forfeiture issues later this year.
5. **Sentence modification issues.** Members reviewed the materials on retroactive application of the 2014 and 2015 changes in the sentence modification statute. Members agreed that there did not seem to be any problems given the clarifying cases and statute changes.
6. **Criminal justice issues.** Judge Spitzer briefly described his e-mail to Jane Seigel on needed criminal justice resources, for her use in testimony she will give to the House Courts and Criminal Code Committee on Jan. 6, 2016. He described his recommendations concerning the following topics: (a) lack of adequate treatment alternatives for individuals with substance use disorders; (b) adequacy of resources to deal with Level 6 felony offenders who will not be able to be sent to the DOC; and (c) limitations of tools available for accountability for drug offenders in the community. Members agreed with these concerns, noting that prohibitions on Level 6 DOC commitments will prevent Level 6 offenders from getting "therapeutic community" treatment. There was general concern about the probable inadequacy of funding for offender treatment in the community.
7. **I.C. 35-35-3-3(b) plea agreement provision.** The Committee discussed the statutory provision that no plea agreement, presentence report, or record of a hearing on an agreement shall be part of the "official record" of the case until the court accepts the agreement. State Court Administration attorneys had questioned whether the provision was a "green paper" confidentiality mandate. Judge Apsley noted that the provision was adopted prior to the adoption of the Evidence Rules, in particular Evidence Rule 410 which prevents use of withdrawn or

rejected plea agreements and factual basis statements as evidence. Members agreed to defer any recommendations, and Mike McMahon is to check with State Court Administration to see if there have been any further developments on the topic and report at the next Committee call.

8. **Hilligoss on advice of rights at probation revocation.** Committee members discussed *Hilligoss v. State*, 34A02-1506-CR-529 (Ind. Ct. App., Nov. 18, 2015), which reversed a probation revocation on the basis that the trial judge had not advised the probationer of his statutory rights in a revocation. Members agreed the Criminal Benchbook Committee ought to deal with the decision. It was asked in discussion whether the advice of revocation rights ought to be repeated when the defendant admits the revocation allegations, if the court has already given the rights at the initial revocation hearing; it was agreed repeating the rights was the better practice.
9. **2016 legislation.** The Committee discussed particular bills:
 - HB 1015, DNA samples from felony arrestees – members agreed there did not appear to be any need for the Committee to weigh in on this bill.
 - SB 160, mandatory juvenile waiver, remand to juvenile court if convicted of different offense – Judges Apsley and Spitzer were concerned that this proposed change will reduce plea agreements.
 - SB 155, mandatory pretrial release for misdemeanors and Level 6 felonies, with exceptions – members were concerned that this bill would reduce their discretion over bail.
 - SB 216, requiring a bail hearing with 48 hours for persons with convictions for felonies, domestic violence offenses, or failure to appear – members expressed concern on the mandated hearing.
 - HB 1129, requiring “automatic” forfeiture of bail upon failure to appear unless the court orders no forfeiture – members agreed this provision was undesirable.
 - HB 1142, requiring mandatory 15 year enhancement if firearm used in commission of a felony and prohibiting plea agreements to avoid the enhancement – some concern was expressed about this bill.
10. **Expungement issue.** Judge Clem reported that the Bureau of Motor Vehicles says it is not obliged to expunge its records of arrests or prosecutions which do not result in any conviction, on the basis that the Bureau is not on the list of entities in the expungement statutes required to remove references to the arrest or prosecution upon a successful expungement proceeding. Judge Clem indicated that he has talked about this issue with Senator Lanane, who represents the Judge’s county, and that Senator Lanane is going to see if the statutes can be amended to add the BMV to the list of entities obliged to expunge their records.
11. **Next conference call.** Members agreed the only legislation which might require Committee action during this year’s session would be the bills affecting bail. Mike McMahon is to monitor those bills and report on any developments. Absent any need to meet on the bail legislation, members agreed a conference call or meeting should be scheduled in the summer, preferably after the General Assembly’s summer study committee agendas are established.

Respectfully submitted,

Mike McMahon
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